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Supreme Court, U.S.
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No. 87-1441

In The
Supreme Court of the United States
October Term, 1987

—o—

H. RAY EVERS, M.D.,
Appellant,

v.

THE BOARD OF MEDICAL EXAMINERS, *et al.*,
Appellees.

—o—

ON APPEAL FROM THE ALABAMA COURT OF CIVIL APPEALS

—o—

MOTION TO DISMISS THE APPEAL OR, IN THE ALTERNATIVE, MOTION TO AFFIRM THE JUDGMENT OF THE ALABAMA COURT OF CIVIL APPEALS

—o—

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MOTION TO DISMISS THE APPEAL OR, IN THE ALTERNATIVE, MOTION TO AFFIRM THE JUDGMENT OF THE ALABAMA COURT OF CIVIL APPEALS

The Appellees in this action, W. Earle Riley, M.D., William D. Lazenby, M.D., Earnest C. Brock, Jr., M.D., Richard H. Esham, M.D., Garland C. Hall, M.D., Jack Hyman, M.D., Patrick B. Jones, M.D., Stephen G. Lauten, M.D., Julius Michaelson, M.D., Peter W. Morris, M.D., Ira B. Patton, M.D., William C. Waller, M.D., James E. West, M.D., Kenneth C. Yohn, M.D., and James A. Pittman, Jr., M.D., as members of the Board of Medical Examiners, and Robert C. Maynor, M.D., Leon C. Hamrick, M.D., Jerry N. Garley, M.D., Richard Harris, M.D., James L. Walker, M.D., Thomas C. Nolan, M.D., and Dale E. Trammell, M.D., as members of the Medical Licensure Commission of Alabama, respectfully move the Court to dismiss this appeal or, in the alternative, to affirm the judgment of the Alabama Court of Civil Appeals on the following grounds:

1. The appeal does not present a substantial federal question.

2. It is manifest that the questions on which the decision of the cause depend are so unsubstantial as not to need further argument.

3. The decision of the Alabama Court of Civil Appeals is correct and should be affirmed.

STATEMENT OF THE CASE

The Appellant, Dr. H. Ray Evers (hereinafter "Evers"), seeks appellate review of the decision of the Alabama Court of Civil Appeals—an intermediate state appeals court. The appeals court rejected various constitutional challenges which had been asserted by Evers in an attempt to forestall the commencement of a license revocation proceeding initiated against him. A copy of the decision of the Court of Civil Appeals is contained in the Appendix.

On November 25, 1985, a complaint seeking revocation of Evers' medical license was filed with the Alabama Licensure Commission which is the state agency invested by statute with the authority to suspend or revoke a physician's license to practice medicine. The formal complaint against Evers was initiated by the Alabama Board of Medical Examiners which had conducted an investigation of the propriety of certain treatments rendered to a patient of Evers at his clinic in south Alabama.

Prior to the commencement of the license revocation hearing Evers filed suit in the United States District Court for the Middle District of Alabama seeking an injunction barring the conducting of the revocation hearing. After conducting an evidentiary hearing, the federal district court dismissed the complaint of Evers concluding that his claims could best be addressed in administrative and judicial proceedings in the state arena.

After dismissal of the federal litigation, Evers instituted a civil proceeding in the Circuit Court of Montgomery County, Alabama, seeking an order enjoining the prosecution of the disciplinary complaint. The basis for

the relief sought was postulated on several grounds including the alleged due process violations. An evidentiary hearing was conducted by the state court judge.

On October 9, 1986, the trial court denied in entirety the relief being sought by Evers. The trial court's ruling was appealed to the Alabama Court of Civil Appeals which affirmed the trial court's decision in an Order entered on March 18, 1987. An application for rehearing filed by Evers was denied without opinion on April 22, 1987.

Evers sought review of the decision of the Court of Civil Appeals through the filing of a Petition for Writ of Certiorari with the Alabama Supreme Court. While the State Supreme Court initially granted the Writ, it subsequently entered an Order on December 4, 1987, quashing the Writ as being improvidently granted. On February 17, 1988, Evers filed his Notice of Appeal to the Supreme Court of the United States.

THE APPEAL SHOULD BE DISMISSED OR THE DECISION OF THE ALABAMA COURT OF CIVIL APPEALS SHOULD BE AFFIRMED

I. FACTUAL BACKGROUND

In substance, Evers asserts that the constitutional safeguards of due process have been violated by implementation and enforcement of the various Alabama statutory procedures governing the initiation, prosecution and adjudication of physician license revocation proceedings. Evers asserts that these statutes foster an impermissible blending of prosecutorial and adjudicatory functions in violation of his constitutional rights. These arguments of Evers were squarely rejected by the Alabama Court of Civil Appeals and its ruling on this issue was completely

in accord with principles enunciated by this Court. Because the grounds raised on appeal do not present a substantial federal question or are so unsubstantial as not to need further argument, this appeal should be dismissed or, alternatively, the judgment from which the appeal is taken should be affirmed.

Since the interrelationship between the Board of Medical Examiners ("Medical Examiners"), the Medical Licensure Commission ("Licensure Commission"), and the Medical Association of the State of Alabama ("Medical Association") forms the core of the constitutional arguments mounted by Evers, it is imperative that a consideration of his constitutional claims proceed from a clear understanding of the relationship, duties and functions of each of these bodies.

THE STATE MEDICAL ASSOCIATION

The Medical Association of Alabama can trace its inception to 1830 when it was first chartered by legislative act. Since its creation the Medical Association has continuously served in many capacities to foster public health in Alabama. For example, since 1873 the Medical Association has by statute functioned as the "State Board of Health". See e.g., Section 22-2-1 *et seq.* Code of Alabama 1975. In its capacity as the State Board of Health, the Medical Association is granted broad authority and jurisdiction over the enforcement of all laws relating to the public health in Alabama. (Section 22-2-2). Because of the vast reservoir of authority granted by the legislature to the Medical Association, it has been characterized in several Alabama decisions as a "quasi-public corporation". See e.g., *Walker v. Medical Society,* 247 Ala. 169,

22 So.2d 715 (1945); *Parke v. Bradley*, 204 Ala. 455, 86 So.2d 28 (1920).

Membership in the Medical Association is open to any physician licensed to practice in Alabama. Application for membership is made through the county chapters of the Medical Association. Political philosophy of applicants is not a precondition to membership.

According to the records of the Medical Association, Evers was a member of that body for over thirty years, from 1941 until 1974. At that time he was dropped from the rolls because of non-payment of dues. Until his medical license was revoked, he remained eligible for membership in the Medical Association.

Evers asserts in his Jurisdictional Statement that he did not desire affiliation with the Medical Association because it espoused political views with which he did not agree. Whether or not Evers agreed with the political stance taken by the Medical Association on various issues was irrelevant. The evidence clearly established that membership in the Association was open to him regardless of his political or social views, that he had embraced the Association by active membership in the past, and that he voluntarily chose not to continue with his membership.

THE BOARD OF MEDICAL EXAMINERS

Created by legislative enactment (Section 34-24-53 *et seq.* Code of Alabama) the Board of Medical Examiners serves, among other capacities, as an investigative and a prosecutorial body in considering evidence that a physician may be guilty of acts or offenses which would war-

rant suspension or revocation of the physician's license to practice medicine. A comprehensive list of acts which may subject a physician to disciplinary action is outlined in Section 34-24-361.

By legislative declaration the membership of the Medical Examiners is composed of the twelve members of the Board of Censors of the Medical Association. (Section 34-24-53). Board members receive reimbursement for expenses and a nominal per diem for attending board meetings or functions. (Section 34-24-54). Funding for the Medical Examiners is generated by license and examination fees paid by physicians. (Section 34-24-340).

THE MEDICAL LICENSURE COMMISSION

The Licensure Commission is by statute granted the "exclusive power and authority to issue, revoke and reinstate all licenses . . . to practice medicine or osteopathy in the State of Alabama." (Section 34-24-311). The Commission is composed of seven physicians, who are political appointees. The only prequalification for service as a member of the Licensure Commission is that the member be a doctor of medicine or a doctor of osteopathy and be licensed to practice in Alabama. There is *no* requirement that members of the Licensure Commission be members of the Medical Association. (Section 34-24-310). Indeed, at least one of the members of the Licensure Commission which considered the complaint prosecuted against Evers was not a member of the Medical Association.

Funding for the Licensure Commission is provided through the auspices of the Medical Examiners. (Section 34-24-312). However, as found by the Court of Civil Appeals, this funding mechanism is far removed from Evers'

characterization that the prosecutor (the Medical Examiners) pays the judge (the Licensure Commission).

The Licensure Commission sets its own budget annually and maintains separate books and records from those of the Medical Examiners. It has separate employees and its own suite of offices in a building shared with the Medical Examiners. The Commission sets the amount of the license fees which are paid annually by all physicians practicing in Alabama. Payment of the fees is made by checks payable to the Licensure Commission. The funds generated by imposition of the license fees are deposited by the Commission in an account which is maintained in the name of the Medical Examiners. Reimbursement of expenses incurred by the Licensure Commission for such items as salaries, rent, etc., is made by checks drawn on this account. Of utmost importance, however, is the fact that the license fees set by the Licensure Commission generate more than adequate revenue to pay the costs and expenses of the operation of the Commission thereby making it self-supporting.

The Licensure Commission acts in an adjudicative capacity in hearing complaints filed against physicians in which suspension or revocation of the license to practice medicine is sought. Although most complaints before the Licensure Commission are prosecuted by the Medical Examiners, state statutes permit any citizen to institute charges against physicians.

In conducting its disciplinary hearings the Licensure Commission follows the Administrative Procedure Act of Alabama. Additionally, the Licensure Commission adheres to other statutory mandates which insure that physicians

are afforded all due process requirements of notice of charges, right to hearing, right to counsel and right of cross-examination. (Section 34-24-361).

In conducting disciplinary hearings, rulings by the Licensure Commission of a procedural nature, such as on discovery matters, are made by the hearing officer for the Commission. The hearing officer does *not* rule upon the merits of the case as this authority is vested exclusively in the members of the Licensure Commission by specific statute. (Section 34-24-366).

The hearing officer originally appointed in the Evers case was Mark McDonald, an attorney for the Licensure Commission who also functioned on a part-time basis as counsel for the Medical Examiners in certain matters unrelated to the Evers dispute. McDonald's part-time service for the Medical Examiners primarily involved "fielding" legal questions. However, McDonald's principal employment was in behalf of the Licensure Commission and his immediate supervisor was Dr. Leon Hamrick, chairman of the Licensure Commission. Contrary to the contention of Evers that the hearing officer had conducted *ex parte* communications with Wendell Morgan, the attorney for the Medical Examiners, the evidence demonstrated without dispute that McDonald had no such contacts or communications concerning any of the matters involved in the Evers case. Instead, he scrupulously avoided obtaining any reports or information about the investigation or the merits of the case. More important, in order to obviate any conceivable appearance of impropriety, McDonald stepped down as hearing officer in the Evers case prior to the commencement of the formal disciplin-

ary proceeding in order to allow the appointment of another attorney to serve in this capacity.

Evers' contention in his Jurisdictional Statement that the statutes governing the hearings conducted by the Licensure Commission mandate the receipt by the Licensure Commission of *ex parte* communications from the Medical Examiners is simply incorrect. Section 34-24-361(h) Code of Alabama provides in pertinent part that after conducting a hearing and taking evidence "the Commission shall request and consider but not be bound by a recommendation from the State Board of Medical Examiners." This procedure—akin to recommendations frequently made by prosecuting agencies in criminal proceedings—is only a recommendation and, by the clear terms of the statute, is not binding upon the Commission. According to Wendell Morgan, counsel for the Medical Examiners, the recommendation made by the Medical Examiners customarily takes the form of a recommendation of revocation of license which is contained in the prayer for relief in the complaint filed before the Licensure Commission. Neither the terms of the statute nor the procedures followed by the Licensure Commission and the Medical Examiners dictate that the Licensure Commission receive these recommendations through the avenue of an "*ex parte*" communication. Similarly, various of the members of the Medical Examiners and the Licensure Commission who testified during both the federal and state court hearing reiterated that there had been no contact or communication between the members of these two bodies with respect to any pending complaint before the Commission.

II. THE COURT OF CIVIL APPEALS APPLIED THE APPROPRIATE STANDARD OF REVIEW

Evers mounts a frontal assault upon the decision of the Court of Civil Appeals contending that the ruling is bottomed upon an incorrect standard of constitutional review. According to Evers, the intermediate appellate court was in error in concluding that it was its duty "to sustain the constitutionality of legislative enactments involving the state's police power unless those enactments are proven beyond a reasonable doubt to be constitutionally invalid." Citing the early case of *Ex parte Rhodes,* 202 Ala. 68, 79 So. 462 (1918), Evers suggests that this judicial presumption in favor of constitutionality of legislative enactments has no field of operation when fundamental constitutional rights are involved. While dicta to that effect may be found in the *Rhodes* decision, subsequent decisions of the Alabama Supreme Court, and other Alabama appellate courts, have made it clear that the principle of statutory construction set forth in the opinion of the Court of Civil Appeals is indeed the applicable standard.

The requirement that a reviewing court uphold the constitutionality of legislation promulgated in the exercise of the state's police power unless the invalidity of the legislation is proven beyond a reasonable doubt has been applied in cases involving such fundamental personal and constitutional rights as the right of privacy, the right to free speech, the right of due process of law, and the right to equal protection of the laws. See e.g., *Ex parte McCurley,* 390 So.2d 25 (Ala. 1980); *State v. Mills,* 278 Ala. 188, 176 So.2d 884 (1965); *Alabama State Federation of Labor v. McAdory,* 246 Ala. 1, 18 So.2d 810 (1944) *cert. dismd.*

325 U.S. 450; *State v. Woodruff,* 460 So.2d 325 (Ala. Crim. App. 1984); *Craig v. State,* 410 So.2d 449 (Ala. Crim. App. 1981). In short, decisions rendered by the Alabama appellate courts subsequent to the ruling in *Ex parte Rhodes, supra,* have recognized that even in cases involving alleged impairment or infringement of constitutionally guaranteed rights, it is the duty of the judiciary to uphold the validity of legislation promulgated in the exercise of the state's police power unless the party challenging these enactments proves their unconstitutionality beyond a reasonable doubt.

Evers' argument that the Court of Civil Appeals employed the wrong standard of review is nothing more than "quibbling with semantics". Regardless of whether this Court begins its review of the legislative enactments under scrutiny with a presumption, in favor of or against their constitutionality, the end result is the same—the statutes pass constitutional muster.

III. THE RELATIONSHIP BETWEEN THE MEDICAL EXAMINERS AND THE LICENSURE COMMISSION PRESENTS NO DUE PROCESS VIOLATIONS.

Evers argues at great length that the alleged entanglements between the Medical Examiners (characterized as the "prosecutor") and the Licensure Commission (the judge) violate due process guarantees afforded to him. In advocating this position Evers relies almost exclusively upon the decision of the Alabama Supreme Court in *Continental Telephone Co. of the South v. Alabama Public Service Commission,* 479 So.2d 1195 (Ala. 1985) and the ruling of the United States Supreme Court in *Gibson v.*

Berryhill, 411 U.S. 564, 36 L.Ed.2d 488, 93 S. Ct. 1689 (1973). As will be discussed hereafter Evers' arguments are misplaced for at least three reasons. First, the entanglements repeatedly referenced by him do not present nearly the sinister relationships as portrayed. Second, the *Continental Telephone* and *Berryhill* decisions do not sweep to the breadth suggested by Evers. Third, and perhaps most important, decisions of this Court and other appellate courts have specifically upheld administrative structures similar to those involved in this case in the face of due process challenges such as those mounted by Evers.

A. THE CONTINENTAL TELEPHONE CASE

At every stage of his legal maneuvers—federal court, circuit court, Court of Civil Appeals, and Alabama Supreme Court—Evers has raised the banner of the decision in *Continental Telephone Co. of the South v. Alabama Public Service Commission,* 479 So.2d 1195 (Ala. 1985) as his panacea for remedying the constitutional ills of the statutory enactments empowering the Medical Examiners and Licensure Commission. Not a single jurist considering his claims has embraced Evers' far reaching construction of the *Continental* decision since his sweeping interpretation of the ruling in that case is completely unfounded.

In *Continental,* the Alabama Supreme Court found that a utility's due process rights were violated because of the interconnection between the adjudicative body (the Public Service Commission) and the agency which opposed the utility's rate increase request (the Public Staff for Utility Consumer Protection). As shown by the evidence in the case, the members of the Public Staff were direct

employees of the Public Service Commission and had no "legal identity beyond what it was—the Commission's Staff." In essence, the Commission had simply designated some of its full-time employees to serve as advocates in presenting evidence and arguments in opposition to utility rate requests.

The Court of Civil Appeals had little difficulty in finding that the facts in the present case are far removed from those found to give rise to constitutional violations in *Continental*. Here, the adjudicative body—the Licensure Commission—has a separate "legal identity" from the Medical Examiners both in terms of statutory creation and composition of membership. This separate identity is strictly adhered to as evidenced by the testimony presented by the Licensure Commission members who stated that they have no contact or communication with the Medical Examiners with respect to any disciplinary proceedings pending before the Commission until the advent of the formal hearing itself.

The *Continental* case cannot simply be considered in a vacuum and read with the literal interpretation suggested by Evers. If Evers' construction of the *Continental* case is adopted then administrative agency hearings will be a thing of the past in Alabama. Under his theory, any administrative agency which provides funding for its hearing officers and administrative law judges will be barred from conducting adversary hearings. That simply is not the import of the *Continental* decision since any such interpretation would be completely at odds with longstanding precedent of this Court in which the constitutionality of administrative tribunals which combined both prosecutorial and adjudicative functions in a single agency have

been upheld. See e.g. *Withrow v. Larkin,* 421 U.S. 35, 43 L.Ed.2d 712, 95 S.Ct. 1456 (1975); *Federal Trade Commission v. Cement Institute,* 333 U.S. 683, 92 L.Ed. 1010, 68 S.Ct. 793 (1947); *Schweiker v. McClure,* 456 U.S. 188, 72 L.Ed.2d 1, 102 S.Ct. 1665 (1982); *Hortonville Dist. v. Hortonville Educ. Assoc.,* 426 U.S. 482, 49 L.Ed.2d 1, 96 S.Ct. 2308 (1976).

B. THE PRINCIPLES ENUNCIATED IN GIBSON V. BERRYHILL DO NOT MANDATE A FINDING OF DUE PROCESS VIOLATIONS

Relying upon the decision of this Court in *Gibson v. Berryhill,* 411 U.S. 564, 36 L.Ed.2d 488, 93 S.Ct. 1689 (1973), Evers asserts that the interrelationship between the medical Examiners and the Licensure Commission presents a sufficient degree of "possibility of prejudgment of the facts" to warrant condemnation of the state statutes under scrutiny. This accusation is without factual or legal support.

From a factual standpoint, Evers cannot point to a single shred of evidence introduced at any of the hearings intimating in the least that the Licensure Commission had prejudged the case against him. Every witness testifying in the federal court proceeding and the state court action categorically stated that it was a universal practice of the Commission to avoid receiving any information about charges filed before the Commission until the adjudicatory process itself had begun.

From a legal perspective Evers' reliance upon *Gibson v. Berryhill* is misplaced. In *Gibson* the Supreme Court upheld a factual finding of bias on the part of the State Board of Optometry whose membership was composed ex-

clusively of optometrists who were members of the Alabama Optometric Association. The Court declared that disciplinary proceedings instituted by the Optometric Board against optometrists who were not members of the Optometric Association should not proceed since the members of the Optometric Board who would sit in judgment had a personal financial stake in the outcome of the administrative proceedings. Several significant factors distinguish *Gibson* from the matters involved in the present controversy.

First, the *Gibson* decision was rendered prior to the promulgation of the Alabama Administrative Procedure Act. Under the law in effect in Alabama at the time of the *Gibson* decision an optometrist who was confronted with disciplinary action did not have the plethora of administrative and appellate remedies that would now be available to him with the advent of the Administrative Procedure Act.

Second, in *Gibson*, this Court expressed concern about the propriety of the Optometric Board serving in the dual capacity of prosecutor and judge. That simply is not the situation in the present case. Here, the Medical Examiners occupies the status of prosecutor while a separate and distinct entity, the Licensure Commission, serves in the judicial capacity.

Finally, in *Gibson*, the district court and the Supreme Court noted that the membership of the Optometric Board was, by statute, limited to members of the State Optometric Association. This association barred from its membership optometrists who were not self-employed, such as the optometrists who were being disciplined. In the pres-

ent case, the adjudicative body—the Licensure Commission—contains no restrictions on the composition of its members other than a requirement that the members be licensed physicians. Membership in the State Medical Association is not a condition to service on the Licensure Commission.

C. THE FUNDING ISSUE

Time and again Evers claims that his due process rights are violated because the Medical Examiners pay the expenses of the Licensure Commission. It is true that Section 34-24-54 Code of Alabama authorizes a funding mechanism by which the Medical Examiners pay the per diem and travel expenses of members of the Licensure Commission incurred in the performance of the duties of their office. It takes a quantum leap, however, to conclude that this statutory funding procedure means that the prosecutor pays the judge. This analogy by Evers simply will not withstand close examination.

Evers would have the Court believe that the Medical Examiners control the "purse strings" thereby threatening the members of the Licensure Commission with refusal to pay their per diem and expenses authorized by statute if the Commission members do not accede to the wishes of the Medical Examiners. In the first place, as noted by the Court of Civil Appeals, the $100 per diem and expense reimbursement is of such a minimal nature that it is ludicrous to assume that the physicians who serve on the Licensure Commission do so because they are well paid for their efforts. The contrary is true. These physicians perform their service as members of the Licensure Commission as a public duty recognizing that the public

interest dictates that a responsive adjudicative body must exist to consider complaints of improper medical practice by physicians. To suggest that these physicians could be bought for $100 is absurd. The relevant point is that the members of the Licensure Commission receive minimal per diem which is drawn from an account that is funded by license fees set by the Licensure Commission itself.

Funding of the Licensure Commission through license fees generated and paid by physicians is nothing unique to this agency. This funding mechanism is not at all unlike a county commission which obtains revenue through license fees which are then used to finance the operations of both the district attorney's office and the local circuit judges. Nor is it dissimilar from many state agencies, such as the Insurance Department, Revenue Department, and Department of Public Safety, which have established administrative boards which are staffed by administrative law judges or adjudicative panels that are paid by the same agency which prosecutes the charges.

There was no dispute that the funds generated as a consequence of license fees set by the Licensure Commission are more than ample to fund this agency. These license fees are paid by physicians in Alabama via checks made payable to the Licensure Commission. This revenue is deposited in a fund maintained in the name of the Medical Examiners. The expenses of the Licensure Commission for such items as employee salaries, per diem for the commission members, and rent are then paid out of this fund.

Additionally, there was absolutely no evidence offered which even hinted that the Medical Examiners have ever

attempted to utilize the power of the "purse strings" to influence a decision by the Licensure Commission. Indeed, the evidence was to the contrary. The Licensure Commission does not blindly follow the recommendations of the Medical Examiners in the prosecution of cases and has frequently ruled against the Medical Examiners in disciplinary cases.

D. THE ALLEGED EX PARTE COMMUICATIONS

Evers suggests that there were *ex parte* communications between Wendell Morgan, the attorney representing the Medical Examiners, and Mark McDonald, the hearing officer originally appointed in the Evers case. He further contends that such communications are only fostered because the Medical Examiners and the Commission share the same office and because, by statute, the Licensure Commission is to receive recommendations from the Medical Examiners before rendering a decision in an adjudicative case. Once again, Evers misstates the evidence and misperceives the legislative mandates.

The Commission and the Medical Examiners do, indeed, have offices in the same building but they do not share the same office space. Each agency pays its pro rata portion of the rent. To suggest that there is anything inherently wrong in such an arrangement would also imply that there is something sinister about circuit judges in Alabama sharing the same court house with the district attorney.

There was absolutely no evidence of any *ex parte* communication between McDonald and Morgan concerning any of the merits of the underlying facts in the Evers

case. Both McDonald and Morgan testified that they went to great lengths to avoid having any such communications. Further, Dr. Yohn and Dr. Morris (members of the Licensure Commission) stated unequivocally that it was their practice not to engage in any communications with the members of the Medical Examiners with respect to an ongoing investigation and they reiterated that no such communications had occurred concerning the Evers case.

E. McDONALD'S INTERIM SERVICE AS HEARING OFFICER IN THE EVERS CASE AND HIS PART-TIME EMPLOYMENT BY THE MEDICAL EXAMINERS DO NOT VIOLATE ANY CONSTITUTIONAL GUARANTEES

Evers suggests that because McDonald had on occasion in the past performed legal services for the Medical Examiners, he was disqualified from serving as the hearing officer in the Evers proceeding. Evers further argues that McDonald's agreement to step down as hearing officer somehow constitutes an admission of wrongdoing. These assertions are simply without foundation.

McDonald's principal duties related to his employment as the attorney for the Licensure Commission. While he had on infrequent occasions in the past rendered legal services to the Medical Examiners, these services were for matters totally unrelated to the Evers case. Once he was selected to serve as the hearing officer in the Evers matter, McDonald was careful to avoid any appearance of impropriety and scrupulously refrained from participating in any discussions with either Morgan or the Medical Examiners concerning the Evers case.

The fact that McDonald stepped down as hearing officer most certainly does not mean that the Licensure Commission conceded that McDonald was biased or prejudiced in any respect. Instead, when Evers began making his accusations that McDonald should be disqualified from serving as hearing officer because he had on occasion represented the Medical Examiners, the Licensure Commission acted promptly to remove any conceivable basis for Evers' contentions by appointing a new hearing officer who had no past association with either the Licensure Commission or the Medical Examiners. Consequently, the adjudicatory hearing for Evers was not conducted with McDonald as the hearing officer. Furthermore, it must be reiterated that the hearing officer is empowered only to rule upon procedural matters such as discovery disputes. By statute, the persons who act in the capacity of judge and who thus make the ultimate decision on the merits of the Evers case are the members of the Licensure Commission (Section 34-24-366).

F. THE ADJUDICATIVE PROCESSES EMPLOYED BY THE MEDICAL EXAMINERS AND LICENSURE COMMISSION MEET DUE PROCESS STANDARDS

Decisions rendered by this Court subsequent to *Gibson v. Berryhill* confirm the conclusion that there is no inherent constitutional infirmity in the statutory mechanisms empowering the Medical Examiners and the Licensure Commission. The appellate decision providing definitive guidance in this area is *Withrow v. Larkin*, 421 U.S. 35, 43 L.Ed.2d 712, 95 S.Ct. 1456 (1975). There, the Supreme Court considered a challenge to the constitutionality of statutes empowering the Wisconsin Board of

Medical Examiners to serve both in the capacity of investigating agency and adjudicative body in determining whether to suspend or revoke medical licenses. The Wisconsin Board conducted an investigative hearing in an attempt to determine whether formal charges should be filed against a physician. After conducting the investigation, the Board filed its charges and notified the physician that it would conduct a contested hearing to determine whether the physician's license should be suspended. The physician then instituted suit in federal court asking that the Wisconsin statutes establishing the Board and delineating its authority be declared unconstitutional because the Board could not be an impartial arbitrar with regard to the merits of the case since it had acted in an investigative capacity. In a unanimous decision this Court rejected the physician's contentions and ruled that the state statutes vesting both investigative and judicial functions in the board were not unconstitutional.

In beginning its analysis the Court outlined the twofold burden imposed upon the physician in order to prevail:

> "The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistics appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented. Very similar claims have been squarely rejected in prior decisions of this court. (Citing cases)"

The Court noted that mere exposure to evidence compiled at the investigative stage was insufficient in itself to impugn the fairness of the members of the Board who also served in an adjudicative capacity at a later adversary proceeding. According to the Court, administrators "are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances." The Court's decision was well summarized in the following passage:

> "It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearing. This mode of procedure does not violate the Administrative Procedure Act and *it does not violate due process of law.*" [Emphasis supplied]

The principles enunciated in the *Withrow* decision have been uniformly applied in other court decisions. See e.g., *Hoke v. Board of Medical Examiners of the State of North Carolina,* 395 F.Supp. 357 (W.D. N.C. 1975); *Martin-Trigona v. Underwood,* 529 F.2d 33 (7th Cir. 1976); *Rite Aid Corp. v. Board of Pharmacy of New Jersey,* 421 F.Supp. 1161 (D. N.J. 1976).

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CONCLUSION

Withrow and its progeny recognize that the blending of investigative and adjudicative functions in a single entity is not of itself violative of constitutional rights. Administrators serving in an adjudicative capacity are presumed to be persons of honesty and integrity unless

the opposite is clearly shown by the party challenging the administrative mechanism. The potential bias of persons serving in such an adjudicative capacity is not shown simply by demonstrating that they serve in the same vocation as the party being disciplined.

Here, the Alabama legislature has, in the exercise of its police power, established an administrative mechanism through which prosecutorial and adjudicatory functions are clearly delineated and made manifestly separate. The fact that there may be some social or business interplay between the attorneys representing the Licensure Commission and the Medical Examiners in matters unrelated to those involved in this controversy does not operate to taint the disciplinary proceedings. Similarly, the fact that the prosecutor and the fact finder are funded from the same source does not render unconstitutional the entire administrative structure. Because the legislative scheme clearly separates the prosecutorial and adjudicative functions and because Evers has failed abysmally in demonstrating any prejudgment of facts or prejudice on the part of the members of the Licensure Commision, this Court should reject Evers' constitutional challenges. The appeal should be dismissed or, alternatively the decision of the Alabama Court of Civil Appeals should be affirmed.

Respectfully submitted,

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APPENDIX

STATE OF ALABAMA—JUDICIAL DEPARTMENT
THE COURT OF CIVIL APPEALS

OCTOBER TERM 1986-87

Civ. 5621

H. Ray Evers, M.D.

v.

The Board of Medical Examiners, et al.

Appeal from Montgomery Circuit Court

BRADLEY, Presiding Judge

This is an appeal from an order of the Circuit Court of Montgomery County, Alabama denying certain declaratory and injunctive relief sought by the plaintiff, Dr. Ray Evers.

Dr. Evers operates a cancer clinic in Cottonwood, Alabama. The record indicates that Evers employed a cancer treatment technique known as an "herbal tumor removal" system which involved the application of certain salves and the prescription of certain vitamins which were designed to stimulate the body's immune system. The treatment also involved the application of a black salve which was designed to burn the patient's skin in an area infected by cancer. The skin was then treated with a yellow salve which was designed to heal the burned skin and cause the cancerous tumor in the patient's body to rise to the skin's surface where it could be removed. Additionally, Evers's herbal tumor removal system required the prescription of vitamins and the administration of enemas containing dimethyl sulfoxide (DMSO), an industrial solvent.

In the latter part of 1984 Mrs. Maxie L. Walker decided to consult the medical authorities about a lump in her right breast. She was advised to undergo surgery and chemotherapy. She did not heed this advice but instead consulted Dr. Evers. Mrs. Walker entered the Evers Clinic in April 1985. During her treatment at the Evers Clinic, Mrs. Walker sustained burns to the right side of her upper torso. Mrs. Walker was admitted to Flowers Hospital the latter part of April 1985 for treatment of these burns. She subsequently died as a result of these injuries.

A complaint was filed with the State Board of Medical Examiners against Dr. Evers. After an investigation the Board filed a complaint with the State Medcal Licensure Commission against Dr. Evers.

Before the Commission could hold a hearing to determine the validity of the complaint filed against him, Dr. Evers filed a complaint in the Circuit Court of Montgomery County against the Board, the Commission, and the individual members of each of these organizations. Dr. Evers sought declaratory as well as injunctive relief to prevent the Board from instituting or proceeding with disciplinary actions against him before the Commission.

After a hearing the circuit court denied Evers's request for relief and he appealed to this court.

Evers asserts that the circuit court erred in refusing to enjoin the proceedings commenced against him before the Commission. In brief Evers attacks the constitutionality of three provisions of Alabama's medical licensing and disciplinary procedure. First, Evers asserts that section 34-24-54 of the Alabama Code is violative

of constitutional due process because of the financial arrangements between the Board and the Commission. Evers also argues that various other provisions create certain conflicts of interest which violate constitutional due process. Second, Evers argues that the appointment powers delegated to the Board by the Alabama Legislature constitute an unconstitutional delegation of legislative authority. Finally, Evers contends that the so-called no-stay provision of section 34-24-367 is unconstitutional.

I. Procedural Due Process

A. Financial Arrangement between the Board and the Commission

Evers's first contention on appeal is that the close financial relationship between the Board and the Commission constitutes a procedural due process violation. Evers argues in brief that the current arrangement between the two is analogous to the type of conflict which would arise in a situation wherein a prosecutor who practices before a certain tribunal compensates the members of that tribunal.

At this point we note that the Board is the investigative and prosecutorial arm of the state's medical profession. *See,* §§ 34-24-36, -53, -56, -57, Code 1975. The Commission, on the other hand, constitutes the adjudicative arm of the profession, and has the exclusive authority to revoke the licenses of physicians who are guilty of professional misconduct. *See,* §§ 34-24-310, -311, Code 1975.

In support of his argument that the financial relationship between the Board and the Commission is violative

of due process, Evers cites *Continental Telephone Co. v. Alabama Public Service Commission,* 479 So.2d 1195 (Ala. 1985). The *Continental Telephone Co.* case, however, can be distinguished from the facts in the present case. *Continental Telephone* involved a hearing before the Public Service Commission regarding a proposed rate increase by a public utility. An organization known as the Public Staff for Utility Consumer Protection attempted to intervene and the intervention was granted. After the Public Service Commission granted only part of the rate increase sought by Continental Telephone Company, Continental and the Public Staff appealed.

On appeal Continental argued that its due process rights were violated because the Public Staff was nothing more than a group of Public Service Commission staff members who had been placed "on loan" to the Governor's Office. The Alabama Supreme Court held that Continental's due process rights were violated because the Public Staff was nothing more than an integral part of the Commission's trial staff under a different label. Thus, the potential for prejudice which existed created a due process violation in and of itself.

The relationship between the Board and the Commission in the present case, however, is much more remote than that of the Public Service Commission and the Public Staff in the *Continental* case. First, the members of the Board are appointed by the Medical Association of the State of Alabama (hereinafter MASA), while members of the Commission are appointed by the lieutenant governor, the speaker of the house, and the governor. *See,* §§ 34-24-53, -310, Code 1975. Second, while both organizations are funded by proceeds from the issuance of

licenses, these proceeds are deposited into a joint account, and each organization establishes its own budget, keeps its own set of books, and uses the joint account to defray expenses incurred. *See,* §§ 34-24-53(b), -54, Code 1975. Finally, the entire amount of compensation received by Board members and Commission members is only $100 per day for days in which they attend official meetings. *See,* 34-24-54, Code 1975. Thus, the respective members of the Board and the Commission, who are licensed, practicing physicians, are far less financially dependent on their compensation than members of the Public Staff in *Continental Telephone.* Moreover, the employer-employee relationship that was present in *Continental* is not present in the instant case.

We recognize that a fair trial before an impartial tribunal or administrative agency is a basic requirement of due process. *Gibson v. Berryhill,* 411 So.2d 564 (Ala. 1975); *In re Murchison,* 349 U.S. 133 (1955). However, it is this court's duty to sustain the constitutionality of legislative enactments involving the State's police power unless those enactments are proven beyond a reasonable doubt to be constitutionally invalid. *Crosslin v. City of Muscle Shoals,* 436 So. 2d 862 (Ala. 1983). We find that Evers has failed to prove that the financial relationship between the Board and the Commission poses any real threat to his due process rights. Thus, we affirm this aspect of the trial court's order.

B. Conflicts Arising out of the Combination of Prosecutorial and Adjudicative Functions

Evers also asserts that various conflicts of interest exist between Commission members and Board members.

Evers says that the fact that the Commission and the Board are housed in the same facilities, as well as the fact that the Board's assistant general counsel serves as the Commission's general counsel, gives rise to a conflict which is violative of due process.

As previously stated, the record reveals that the general counsel for the Board serves as the prosecutor for the Board before the Commission and the assistant general counsel for the Board serves as hearing officer for the Commission. The Commission's hearing officer, however, is neither empowered nor authorized to vote in license revocation cases, and the seven members of the Commission, all of whom are physicians, bear sole responsibility for determining whether a physician's license should be revoked. *See*, § 34-24-11, Code 1975.

Evers also argues, however, that potential due process violations exist because of conflicts of interest which exist between the Board's general counsel, Wendell Morgan, and the Board's assistant general counsel, Mark McDonald. As previously stated, the Board's general counsel serves as the legal advisor to the Board as well as the prosecutor in license revocation cases before the Commission. Additionally, the Board's assistant general counsel, Mark McDonald, serves as the legal advisor to the Commission as well as the hearing officer in matters before the Commission.

Our review of the record, as well as case law in other jurisdictions, however, indicates that no unconstitutional conflict of interest exists in the present case. The evidence reveals that while Mr. McDonald and Mr. Morgan share many common duties in their respective

capacities Mr. McDonald is an employee of the Commission and answers directly to the chairman of the Commission, Dr. Leon Hamrick. Conversely, Mr. Morgan, the Board's general counsel, answers to the Board of Medical Examiners and MASA. The evidence also reveals that before being hired Mr. McDonald was interviewed by Mr. Morgan, the credentials committee of the Board, and the Commission. Thus, even though Mr. McDonald's duties include his service as the Board's assistant general counsel, he was neither hired directly by the Board nor is he always answerable to the Board. For these reasons, Evers's claim that the financial relationship between Mr. McDonald, Mr. Morgan, the Board, and the Commission creates a conflict of interest violative of due process is not supported by the evidence.

Therefore, based upon our review of the record in the present case, we are unable to say that Evers has offered sufficient proof to overcome the presumption that the Board's general counsel and assistant general counsel as well as those physicians serving as adjudicators on the Commission are men of honesty and integrity who are not susceptible to being swayed by potential conflicts which may exist. *Withrow v. Larkin*, 421 U.S. 35 (1975); *see also, Winslow v. Department of Professional & Occupational Regulation*, 348 So. 2d 352 (Fla. Dist. Ct. App. 1977). Since Evers has failed to prove that his procedural due process rights were violated in this case, we find that the formation and compensation schemes of the Board and the Commission do not offend due process.

II. Delegation of Appointment Power to MASA

Evers's next contention is that section 34-24-53 constitutes an unconstitutional delegation of legislative authority to a private organization, MASA.

The statute in question provides in pertinent part:

> "The board of censors of the Medical Association of the state of Alabama, as constituted under the laws now in force, or which may hereafter be in force, *and under the constitution of said association, as said constitution now exists or may hereafter exist,* is constituted the state board of medical examiners and is charged with the duties and clothed with the powers hereinafter prescribed; *said board is hereby vested with authority to adopt and promulgate rules and regulations and to do such other acts as may be necessary to carry into effect the duties and powers which accrue to it under laws now in force or which may hereafter be in force;* and a quorum as provided for by the constitution of the Medical Association of the state of Alabama shall be competent to act."

§ 34-24-53(a), Code 1975 (emphasis ours).

As previously stated, Evers argues that section 34-24-53(a) violates Article IV, Section 44 of the Alabama Constitution by delegating appointment power to MASA and by delegating to MASA the power to decide the number of members on the Board as well as what shall constitute a quorum. The Board, on the other hand, argues that the provision is not constitutionally offensive because it is rationally related to a legitimate State purpose and because sufficient legislative safeguards exist.

It is a fundamental rule of constitutional law that the lawmaking authority of the legislature may not be dele-

gated to any other department or agency, either public or private. *State v. Vaughan,* 30 Ala. App. 201, 4 So. 2d 5 (Ala. Ct. App. 1941). Therefore, when certain legislative powers are delegated to administrative or quasi-administrative officials, it is a prerequisite that adequate standards be established by the legislature so that officials to whom the powers are delegated will not legislate but, rather, will carry out the legislative will. *See, Commission on Medical Discipline v. Stillman,* 291 Md. 390, 435 A.2d 747 (1981). In the realm of public health, however, administrative officials are permitted more control, and, thus, less strict legislative guidelines are required. *Commission on Medical Discipline v. Stillman, supra.*

Article IV, Section 44 of the Alabama Constitution precludes the legislature from delegating its lawmaking authority to MASA; however, this does not mean that the legislature is precluded from delegating any authority to MASA. *See, Yielding v. State,* 232 Ala. 292, 167 So. 580 (1936). Indeed, Alabama courts have consistently held that the legislative delegation of appointment power it could have itself exercised does not constitute an unconstitutional delegation of lawmaking power. *Yielding v. State, supra; see also, In re Opinion of the Justices,* 252 Ala. 559, 42 So. 2d 56 (1949); *Parke v. Bradley,* 204 Ala. 455, 86 So. 28 (1920).

In the present case the legislature created the Board and provided that its membership will be composed of the members of the Board of Censors who, in turn, are selected by the Medical Association of Alabama. Pursuant to its constitutional authority, the legislature could have prescribed a different appointment procedure, for ex-

ample, authorizing the governor and other governmental officers to name the members of the Board. However it chose to repose the appointment power in a quasi-administrative body—the Medical Association of Alabama. *See, Parke v. Bradley, supra.* We find no constitutional impediment to this delegation of appointment power.

Evers also contends that the provisions of section 34-24-53(a) amount to an unconstitutional delegation of legislative authority because the statute allows MASA to determine what comprises a quorum for purposes of Board meetings. Evers contends that the delegation of authority to MASA is unconstitutional because the statute allows MASA to regulate future Board membership via its constitution.

As a general rule, the legislature may delegate to its own appointed administrative agencies the authority to make such minor rules and regulations as are necessary or appropriate for administration or enforcement of its general statutes. *State v. State Board of Medical Examiners,* 209 Ala. 9, 95 So. 295 (1923). Section 34-24-53(a) specifically provides that, in addition to regulation by MASA's constitution, the Board shall also be "constituted under the laws now in force, or which may hereafter be in force." § 34-24-53(a), Code 1975. Additionally, the statute in question vests the Board "with authority to adopt and promulgate rules and regulations and to do such other acts as may be necessary to carry into effect the duties and powers which accrue under the laws now in force or which may hereafter be in force." § 34-24-53(a), Code 1975.

A state has broad power to establish and enforce standards of conduct within its borders relative to the

health of its citizens. *See, Stephens v. Dennis,* 293 F. Supp. 589 (N.D. Ala. 1968). In our opinion, the legislature has not exceeded its authority by delegating certain powers to MASA and the Board because the legislature provided sufficient standards in the statute in question by which MASA and the Board must be governed. Admittedly, the statute in question establishes MASA's power to appoint the Board members under present and future laws of the state as well as under MASA's constitution. The statute, however, then empowers the Board to adopt rules which are necessary to carry current and future legislation into effect, and subrogates MASA's authority to that of the legislature by stating that the Board's composition shall be subject to existing as well as future legislation. *See,* § 34-24-53(a), Code 1975.

Because sufficient guidelines are established to serve as benchmarks for MASA's board appointments, that appointment power is not constitutionally offensive. Additionally, because section 34-24-53(a) sets legislative guidelines for the Board to follow, it is also nonviolative of Article IV, Section 44 of the Alabama Constitution.

III No-Stay Provision

Section 34-24-367 provides, in pertinent part:

> "Any order of the medical licensure commission suspending or revoking a license to practice medicine or osteopathy shall have immediate effect and *shall not be stayed or held in abeyance by any court.*"

§ 34-24-367, Code 1975.

Evers asserts that the so-called "no-stay provision" of section 34-24-367 violates both the due process clause of

the United States Constitution as well as various similar provisions of the Alabama Constitution.

We note, however, that section 34-24-367 applies only to Commission orders actually revoking or suspending a physician's license. The controversy in the present case merely involves Evers's attempt to obtain declaratory and injunctive relief to prevent the Commission from ever hearing the Board's complaint against him.

As a general rule, injunctive and declaratory remedies, such as those sought in the present case, lie within the discretion of the judiciary. Moreover, the courts are reluctant to allow such relief against administrative determinations unless those remedies arise in a context ripe for judicial determination. *See, Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

The statute as well as the facts in the present case reveal that Evers's ability to obtain injunctive relief was not yet infringed upon by section 34-24-367. Furthermore, section 34-24-367 does not apply until the Commission has actually issued an order denying or revoking a physician's license. Thus, Evers's constitutional challenge of the no-stay provision is not ripe for adjudication at this time. Should the Commission actually issue such an order revoking or suspending Evers's license to practice medicine, this issue will then be ripe for determination pending Evers's appeal from the circuit court.

We, therefore, refuse to address the issue of Evers's constitutional challenge to the no-stay provision in question.

IV. Conclusion

The briefs and record before us indicate that the relationship between the Board and the Commission is not so inseparable as to violate due process. Additionally, the statutory provisions in question do not constitute an unconstitutional delegation of authority under Article IV, Section 44 of the Alabama Constitution. Finally, Evers's constitutional attack on the no-stay provision of section 34-24-367 is not yet ripe for adjudication, and, therefore, we refuse to address it at this time.

For the foregoing reasons, we affirm the circuit court's judgment denying the declaratory and injunctive relief sought by Evers.

AFFIRMED.

Holmes and Ingram, JJ., concur.